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# JUDICIAL AND REGULATORY DECISIONS

Department Editor: Joseph F. Grinnell\*

## RE-ORDERING THE NATIONAL AIR MAP — HOW CAN IT BE ACCOMPLISHED UNDER THE CIVIL AERONAUTICS ACT?

ONE of the major problems that has been presented to the CAB for solution is the pressing need for the formulation of a policy which will permit and encourage the revision of our air pattern in light of the advances that have been made and will continue to be made in equipment and flying techniques.<sup>1</sup> The major part of this paper will be devoted to a discussion of the various methods that have been suggested to attain this objective and to the presentation of an analysis of their respective merits as viewed in the light of the Civil Aeronautics Act of 1938.<sup>2</sup>

When the Act was passed in 1938, the United States embarked on a new era insofar as the development of aviation was concerned. This Act had for its objective not the mere regulation of air transportation, but rather the active promotion, fostering and encouragement of aviation and the development of an over-all air pattern "properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."<sup>3</sup> The Board's control over the air map was derived from Section 401 which provided that "no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."<sup>4</sup> The Board was not to issue the certificate of convenience and necessity unless it found that the certification of the applicant would be in the public interest as determined by the objectives of the Act.<sup>5</sup>

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<sup>1</sup> See *Western-United, Acquisition of Air Carrier Property*, 8 CAB 298, p. 343.

<sup>2</sup> 52 Stat. 973, 49 USCA § 401 (Supp. 1947).

<sup>3</sup> The declaration of the policy of the Act appears in §2, providing:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in and foster sound economic conditions in such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics." 52 Stat. 980, 49 USCA §402 (Supp. 1947).

<sup>4</sup> 52 Stat. 987, 49 USCA §481 (Supp. 1947).

<sup>5</sup> §401(d) (1) provides:

"The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and

The fact that the air network could be changed just as drastically by mergers and consolidations of previously certified carriers was recognized by the drafters of the statute and these activities were to be approved by the Board only if they met the same standard required for original certification.<sup>6</sup> However, by allowance, subject to Board approval of merger of air carriers, an additional problem was placed before the Board, viz., that of determining whether the price set on the transaction by the parties involved was in the public interest.<sup>7</sup> This in turn involved the question of whether the CAB should allow capitalization of the certificate of convenience and necessity for the purposes of sale.<sup>8</sup> The earliest case in which the Board was squarely confronted with that issue was the *First Marquette* case.<sup>9</sup> The purchase price set by the parties was largely in excess of the physical assets, and developmental costs, and it was evident there had been a capitalization of the certificate of convenience and necessity in its determination.<sup>10</sup> The Board held that a price above the prudent investment value of the property of the carrier being sold would not be in the public interest as they opined that it was inevitable that that part of the price represented by the certificate of convenience and necessity would eventually be paid for by the public.<sup>11</sup>

Shortly thereafter, in the *Second Marquette* case,<sup>12</sup> where approximately the same transaction was involved,<sup>13</sup> the Board made a complete about face. This time franchise value as an element in the purchase price was approved as being within the public interest.<sup>14</sup> The Board reaffirmed this holding in the *Western-United* case,<sup>15</sup> in which Mr. Landis filed a long dissenting opinion. This line of decisions is of prime importance not only because of the effect it has on the financial structures of the air carriers, but also, and what this writer believes is more important, because it is interrelated with the need for a rejuvenation of our national air map. The members of the Board, although differing as to the means, are unanimous in the belief that it is in the public interest to have a reordering of our air pattern.<sup>16</sup>

The Board does not have any specific statutory power to compel an aircarrier against its will, to transfer its certificate to another, even

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necessity; otherwise such application shall be denied." 52 Stat. 987, 49 USCA §481 (Supp. 1947).

For the factors that enter into a determination of public interest, see note 3 *supra*.

<sup>6</sup> §408(c) provides in part that:

"Unless . . . the Board finds that the consolidation, (or) merger . . . will not be consistent with the public interest . . . it shall by order approve such consolidation (or) merger. . . ." 52 Stat. 1001, 49 USCA §488 (Supp. 1947).

<sup>7</sup> *Acquisition of Marquette by TWA*, 2 CAB 1, 10 (1940).

<sup>8</sup> *Acquisition of Marquette by TWA*, 2 CAB 1 (1940); *Acquisition of Marquette by TWA, Supplemental Opinion*, 2 CAB 409 (1940); *Western-United*, note 1 *supra*.

The primary problem as to whether the merger itself, exclusive of the matter of price, is within the public interest, and the factors involved in the Board's decisions, is definitively discussed in Westwood, *Choice of the Air Carrier for New Air Transport Routes, Part I*, 16 Geo. Wash. L. Rev. 1 (1947).

<sup>9</sup> *Acquisition of Marquette by TWA*, 2 CAB 1 (1940).

<sup>10</sup> Physical assets were valued at about \$30,000 as compared with the purchase price of \$473,333.

<sup>11</sup> *Acquisition of Marquette by TWA*, 2 CAB 1, 15 (1940).

<sup>12</sup> *Acquisition of Marquette by TWA, Supplemental Opinion*, 2 CAB 409 (1940).

<sup>13</sup> The parties had submitted an amended agreement so that the purchase price was reduced by \$160,000.

<sup>14</sup> *Id.* at 415.

<sup>15</sup> *Western-United*, note 1 *supra*.

<sup>16</sup> *Id.* at 323; see also p. 343.

though such a transfer might be in the public interest.<sup>17</sup> Still, this does not mean that the Board is powerless to modernize our air network. There have been three devices which have been suggested to accomplish this end:<sup>18</sup>

(1) The Board could issue new certificates over the same or parallel routes where public interest requires this, even though such new operations may divert substantial revenues from existing carriers.<sup>19</sup> If the competition is made severe enough, the resulting economic pressure will force the originally certified carrier to withdraw.

(2) The Board could consider the refusal of an uneconomic carrier to accept what is in the Board's estimation the reasonable value of its physical assets as sufficient to support a charge of inefficient management, thereby resulting in a reduction of subsidy to the recalcitrant "seller," and pressurizing the carrier into a forced sale.<sup>20</sup>

(3) The Board could let the profit motive supply the incentive necessary to induce the seller to relinquish his route by allowing a capitalization of the certificate of convenience and necessity.<sup>21</sup>

#### *Method No. 1—Granting Competition*

(a) *Mechanics*—The Board first makes a determination that it is in the public interest for Carrier B to operate a route which Carrier A had previously been certificated to run. Carrier B then makes an offer to Carrier A to purchase the route for a price based on what the Board considers to be the fair market value of its physical assets. If Carrier A refuses, the Board then issues another certificate to fly the same route or a closely paralleling route to Carrier B. The result is that Carrier B is able to operate more efficiently since the route is, *ex hypothesi*, an integrated part of B's system, and Carrier A is squeezed out of business.

(b) *Criticism*—This method does not specifically contravert the terms of the statute—but it leaves little else unturned in a major upheaval of the Board's policy to date re competition. The Board has been committed to a policy that it will not install competition on a route unless it is their opinion that the route can economically support two carriers.

"The Act thus implies the desirability of competition in the air transportation industry *when such competition will be neither destructive nor uneconomical . . .*"<sup>22</sup> (Italics supplied.)

This suggested device is a complete reversal of that theory as it is a means of changing the air map only by very reason of the fact that competition is economically unsound on this particular route. In addition to overruling this well established body of administrative decisions, it seems to be founded on a misconstruction of the statute, as viewed in the light of surrounding circumstances.

<sup>17</sup> A forced transfer of a certificate has the same effect as a revocation and reissuance of a certificate. §401(g) provides that the certificate shall continue into effect until revoked. §401(h) provides that the certificate may only be revoked for an intentional violation of the statute. 52 Stat. 989, 49 USCA §481 (Supp. 1947). The carrier involved in our situation *ex hypothesi* is not guilty of a willful violation of the statute.

<sup>18</sup> There is a possible fourth method in that the Board has the power to suspend a certificate if they find that public convenience and necessity so require. 52 Stat. 989, 49 USCA §481 (Supp. 1947).

But it is felt that there is a big distinction between suspension and revocation. See discussion by Black, *Suspension of Certificate of Convenience and Necessity Under the C. A. A. of 1938*, 14 J. of Air L. & C. 512 (1947).

<sup>19</sup> *National Air, Daytona Beach—Jacksonville Op.*, 1 CAA 612, 617 (1940).

<sup>20</sup> *Western-United*, *supra* note 1, at 342.

<sup>21</sup> *Id.* at 30 (majority opinion).

<sup>22</sup> *TWA, North-South California Service*, 4 CAB 373, 375 (1943).

This method is based on Section 2, where it appears that public convenience and necessity should be deemed, among other things, to require:

"Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."<sup>23</sup>

A proper interpretation of this provision entails a search for the reasons for its inclusion in the Act. That the "point to point competition" necessarily employed in this suggested device was not in the minds of the framers of the statute is evidenced by the Report of the Federal Aviation Commission of 1935 upon which they drew freely for ideas.<sup>24</sup> The framers of the statute seemed to include this mild reference to competition only as a soothing antidote to the prevalent fears of monopoly,<sup>25</sup> and to invoke an interpretation of this provision as is suggested above would be no more than a rationalization of a desired conclusion. That the Board does not take this method too seriously is evidenced by the fact that it is not even dignified by discussion in any of the Board's decisions, even where, as in the *Western-United* case, it had been proposed as a possible solution for the air map in the brief of the Public Counsel.<sup>26</sup> Even the effectiveness of this method is not beyond reproach unless it be coupled with the elimination of subsidy payments to the first carrier. If that is a part of this device, then it becomes closely akin to method No. 2.

*Method No. 2—Reduction of Mail Pay to Recalcitrant Seller*

(a) *Mechanics*—Assume again that Carrier A is an uneconomic carrier which has been operating a route which the Board feels would form a more closely integrated part of Carrier B's system. If Carrier B made an offer to buy out Carrier A at a price which the Board considered fair in that it was "bottomed on investment,"<sup>27</sup> and Carrier A refused to accept, the Board would reduce its subsidy on a charge that it was not being managed economically.<sup>28</sup> Thus Carrier A would be pressurized into an involuntary merger and transfer of its certificate by action of the Board.

(b) *Criticism*—A forced transfer is in practical effect a revocation of A's certificate and as such, it seems more pertinent to look for guidance to that part of the Act that directly deals with revocation of certificates rather than the section that has to do with the setting of mail rates. We find under Section 401(h) that the only ground existent for withdrawal of the certificate is a violation of the Act, itself, or of some provision of the certificate.<sup>29</sup> That this is the only ground contained in the Act is a vigorous denial of the existence of the means suggested by Mr. Landis.

<sup>23</sup> 52 Stat. 980, 49 USCA §402 (Supp. 1947).

<sup>24</sup> Report indicates that there was little direct competition and that the type of competition that was thought desirable was of an indirect source. REPORT OF FEDERAL AVIATION COMMISSION, 61, 62 (January 1935).

<sup>25</sup> "Furthermore, there was undoubtedly a mild nervousness about the dangers of 'monopoly' when the Act was under consideration." Westwood, *Choice of the Air Carrier for New Air Transport Routes, Part II*, 16 Geo. Wash. L. Rev. 159, 166 (1948).

<sup>26</sup> *Western-United*, note 1 *supra*.

<sup>27</sup> Landis applies the sole standard of investment value in a determination of fair price in much the same manner as he would employ that sole standard in rate-setting. *Western-United*, *supra* note 1, at 342.

<sup>28</sup> §406(b) provides for the determination of the mail rates, which is the indirect method of subsidization employed by this Act. It sets out as one of the factors to be considered a judgment of whether the carrier has been under honest, economical and efficient management.

<sup>29</sup> See note 17 *supra*.

It is submitted that what the legislators had in mind when they talked about economic, efficient and honest management was the internal operation of the air carrier. They wanted the Board to give due consideration to unnecessarily high operating costs so that rates would be set so as to squeeze out this avoidable waste. The situation before us now is of a different sort. The lack of economy involved is what may be called "external uneconomy" in that it is not the result of waste within the organization of the carrier, but rather is a result of technological developments which render this route uneconomical for this carrier to operate, regardless of its internal efficiency. To penalize a carrier in this way seems not only a violation of the intent of the statute but a violation of due process as well. It is true that the government gave the carrier the certificate but this is not the place for the application of "What the Lord giveth, the Lord may take away." By the words of the Act, the taking away of the certificate was to be only for violation of the terms of the statute or of some provision of the certificate.<sup>30</sup> That was not the case here.

The question then arises as to how effective a cure this is for the air map. There is a serious restriction to its applicability in that by confession of its proponent, it can only take effect in the case of an uneconomic route.<sup>31</sup> Thus, if the route is a profitable one, the Board will be powerless to act although it finds that it will be in the public interest to make the line a part of another system.<sup>32</sup>

The dangers involved to the public in the employment of this device are a sufficient deterrent even if the statute itself does not prove enough of an obstacle. Mr. Landis, himself, realized that one of the by-products of a carrier's receiving an inadequate return on its investment would be a deterioration in the quality of the service. This is a more serious result than a mere inconvenience to the public.

"Impairment in the quality of service may seriously undermine safety standards . . . Maintenance procedures would be compromised; desirable but avoidable expenditures would be foregone; the number of employees would be kept at a minimum. All of these developments mean a series of compromises between maintaining fully adequate service and higher than minimum safety requirements on the one hand, and providing barely adequate service and minimum safety standards on the other."<sup>33</sup>

Thus while the carrier was being squeezed into submission, the public might pay for this conflict in human lives. The longer the carrier lasted in its fight for survivorship, the greater the danger to the public. That might well prove a platform for an argument that the subsidy not be reduced but eliminated. But even Mr. Landis does not find support for that in the statute<sup>34</sup>—and still a euthanasia might prove to be more in the public interest than a slow strangulation of the carrier.

#### *Method No. 3—Capitalization of Franchise Value*

This method, which is the one which has been adopted by the Board,<sup>35</sup> employs as an instrument for modernizing the air map, the profit incentive. It permits Carrier A to sell out to Carrier B at a price greater than the mere

<sup>30</sup> See note 17 *supra*.

<sup>31</sup> See *Western-United*, *supra* note 1, at 342.

<sup>32</sup> It is true, but to a lesser extent, that the same limitation might apply to method No. 3 as the price set on a profitable route might well be prohibitive.

<sup>33</sup> See *Western-United*, *supra* note 1, at 339, 340 ft. note 23.

<sup>34</sup> *Id.* at 342.

<sup>35</sup> *Acquisition of Marquette by TWA*, *Supplemental Opinion*, 2 CAB 409 (1940); *Western-United*, note 1 *supra*.

value of its investment, allowing the seller to capitalize its certificate of convenience and necessity. In so doing it employs the profit motive of free enterprise to break the stalemate and to effect a truly voluntary change of the air map.<sup>36</sup>

In an effort to keep that part of the price which can only be attributable to the certificate from being borne by the public, the Board provided that that portion of the purchase price shall come out of surplus and be written off immediately.<sup>37</sup> The Board also stated in definite terms that it has been and would continue to be its policy not to figure it in as a part of the rate base either directly or indirectly.<sup>38</sup> It is at that point that Mr. Landis takes issue with the Board. He contends that it is inevitable that despite the preventative measures taken by the Board, that part of the price which is represented by a capitalization of the certificate will sneak into the rate base, and thus in the final analysis, be borne by the public.<sup>39</sup> A judgment as to whether this expenditure will necessarily find its way into the rates as set by the Board depends on an analysis of the method by which the rates are set, and an appreciation of the philosophy and theory behind it. This is the basic cause of the Board's schism.

Mr. Landis' belief that this capitalization of the certificate is bound to result in inflation stems from a basic premise that a utility is only entitled to the mathematical equivalent of a fair return on its investment. Investments are figured at their original cost to the carrier less depreciation; and fair return is that precise profit that is necessary to attract fresh capital into the industry; that anything over and above that figure is something that the carrier should not receive—but only does because of the inefficiency of the Board in setting rates.<sup>40</sup> The majority, on the other hand, looks at a fair return on an investment base as a constitutional minimum, but by no means as a maximum.<sup>41</sup> It does not consider the fact that different carriers receive different rates of return on their respective investments as a failing on their part. In fact it has been the result of a conscious effort on the part of the Board and the result of a definite policy to reward a carrier for making headway in the economy of its operation by virtue of efficient management.<sup>42</sup> The ultimate goal has been, of course, to reach that point where the carriers are able to operate without the benefit of a subsidy.

<sup>36</sup> Peculiarly enough, Mr. Landis admits that the reordering of the air map can only be accomplished by *voluntary* consolidations, mergers, and route transfers. See *Western-United*, *supra* note 1, at 325. It is scarcely tenable that the method suggested by Mr. Landis is voluntary.

<sup>37</sup> *Western-United*, *supra* note 1, at 342, 343.

But there have been occasions where it was impossible or inadvisable to charge to surplus that part of the purchase price which represents the capitalization of the franchise. In that case, the Board will substitute a requirement that it be charged to special account No. 1920, under the *Uniform System of Accounts for Domestic Air Carriers*. Board Order Serial E-786, Sept. 10, 1947.

<sup>38</sup> *Western-United*, *supra* note 1, at 314.

<sup>39</sup> *Id.* at 338.

<sup>40</sup> *Id.* at 326.

<sup>41</sup> Mr. Justice Brandeis pointed out in his notable dissent in the *Southwestern Bell Telephone Company* case that while a constitutionally compensatory rate requires that the public utility be allowed to earn enough to attract capital, a fair and reasonable rate fixed by a regulatory body "may allow an efficiently managed utility much more." *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 291 (1923). See excellent discussion by Burt and Highsaw, *Regulation of Rates in Air Transportation, Part II*, 7 La. L. Rev. 378, 382 (1947).

<sup>42</sup> "Between the barely compensatory rate required by the Constitution and the fair and reasonable rate contemplated by a legislation enactment there exists a marginal field in which administrative discretion may operate to provide an incentive to enterprising management and a stimulus to pioneering initiative which are so essential to the development of air carrier industry." *American Air*

It seems evident that if the rate of return can be no greater than a fair return on investment, that part of the purchase price which was excluded from the rate base will ultimately have to be included in it;<sup>43</sup> it is equally true, however, that if the purchasing carrier due to his efficiency, has been getting more than a reasonable return, if figured on the investment base alone, there is no reason to state *a priori* that either the rate will be raised or the investment base expanded.<sup>44</sup>

If the problem of rate-setting were to be met *de novo*, there would be an argument for holding that the constitutional minimum should be the maximum. But the Board has seen fit to use the investment base as a starting point and has gone on to make upward adjustments from there, using the attainment of the objectives of the Act as a guide.<sup>45</sup> This policy seems to be gaining in favor as evidenced by a trend in setting joint rates.<sup>46</sup> Thus Mr. Landis' complaint seems in the main to be lodged against the method of rate-setting employed by the Board rather than against the capitalization of the franchise *per se*.<sup>47</sup>

The Board, as a condition to its approval to the purchase in the *Western-United* case, required the purchaser to charge to earned surplus and to write off immediately that part of the purchase price that was not allowed as a part of the rate base. It seemed to feel that this would prevent this figure from creeping into the rate base.<sup>48</sup> But it is suggested that this will have little effect one way or the other insofar as keeping the investment base at the same size is concerned,<sup>49</sup> except for obvious and intentional inclusions which is not the nub of our present problem. This accounting practice has another effect, however, which Mr. Landis tends to minimize.<sup>50</sup> It is of

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*Lines, Inc.—Mail Rate Proceeding*, 3 CAB 323, 334 (1942); *accord*, *Eastern Air Lines, Inc.—Mail Rate Proceeding*, 3 CAB 733, 755 (1942).

<sup>43</sup> Assume that 6% is the rate needed to attract capital in the industry. If Carrier A has a rate base of \$4,000,000, the return on the investment would be \$240,000. If then Carrier A buys out, at a price of \$3,000,000, Carrier B whose investments were valued at \$1,000,000, the new rate base would be but \$5,000,000, while the actual investment of Carrier A is \$7,000,000. This would yield Carrier A a return of only \$300,000 on a \$7,000,000 investment or approximately 4%. By hypothesis, this would be insufficient to attract new money to the carrier and the Board would seem compelled either to increase the rate of return in the authorized investment or to allow the entry of the additional \$2,000,000 into the rate base.

<sup>44</sup> If we take the actual rate-setting policy of the Board into consideration, the result reached in note 43 *supra* does not necessarily follow. We can imagine a situation in which Carrier A was getting a return of 9% due to efficiency of operation. That would yield \$450,000 on the combined rate base or better than 6% on the amount actually invested. That would be sufficient *ex hypothesi* to attract new capital to Carrier A.

<sup>45</sup> See note 39 *supra*.

<sup>46</sup> *Eastern Air Lines, Inc., Mail Rates*, 6 CAB 551, 555 (1945). The use of uniform rates accentuates the differences in rates of return of the various carriers, as with the spread of investment bases amongst the grouped carriers, less emphasis has to be put on the investment base if uniform rates are to be charged to the public.

<sup>47</sup> It is beyond the scope of this paper to go into a detailed appraisal of the rate-setting methods of the Board. See Burt and Highsaw, *Regulations of Rates in Air Transportation, Part I*, 7 La. L. Rev. 1 (1946); Vanneman, *Recent Trends in Domestic Airmail Rate Cases*, 14 J. of Air L. & C. 254 (1947).

<sup>48</sup> *Western-United*, *supra* note 1, at 319.

<sup>49</sup> *Id.* at 336.

<sup>50</sup> The argument is presented that even if the purchasing air carrier is in good financial status at the time of the proposed merger, the field of air transportation is subject to such grave fluctuations that not much weight can be put on it. *Id.* at 312. This type of argument would tend toward the imposition of a restriction on the payment of dividends out of surplus. It can hardly be argued that this would be within the power of the Board.



value in that a large earned surplus is some indication of the financial health of a corporation. It also acts as a brake on a further change in the capital structure of the carrier over which the Board has no immediate control, *viz.*, by cutting down the fund available for dividends.

Mr. Landis objects that if the purchase price is not bottomed on investment, there is no way of determining whether the price is in the public interest.<sup>51</sup> If he means that there is no rule of thumb that can be applied, the writer agrees. But merely because an objective is difficult to obtain is no reason to abandon it. It is admitted that the Board in the *Western-United* case did not discuss at any length the factors that go into a determination of whether the price is in the public interest. It did draw certain rough lines. As a general guide, it set the fair commercial price as that established by the arm's length bargaining of the parties.<sup>52</sup> As an outside limit, it stated that the price cannot be disproportionately large.<sup>53</sup> The financial competence of the buyer was also taken into consideration.<sup>54</sup> The Board, in addition, stated that it will only interfere if managerial discretion has been abused.<sup>55</sup> In the *Second Marquette* case, the Board treated the purchase as but one element of the public interest,<sup>56</sup> stating that it was to be balanced with other pertinent factors.<sup>57</sup> The following are some of the elements which it is suggested should be weighed in a determination of the reasonability of the capitalization of the franchise:

- (1) The overall advantage of the transaction to the air map.
- (2) The prognosis as to whether under the present rate system the buyer will recoup the "excessive" part of the purchase price within a reasonable time.
- (3) The saving to the public in the subsidy to the air carrier being bought out.<sup>58</sup>
- (4) The degree to which the transaction will strengthen the purchasing carrier.

It seems to be more in keeping with the theory of the Act to apply to the purchase price itself not a mechanical standard but many of the same factors which initially went into a determination of whether it was in the public interest to have this merger at all. In fact an inconsistency would arise if public interest is determined one way in regard to the physical merger itself and another way in regard to the purchase price. And indeed the statute makes no such differentiation.<sup>59</sup>

Even assuming there is an inflationary aspect to these transactions, if the air map be skillfully planned with an eye to the future, this reshuffling

<sup>51</sup> *Id.* at 318.

<sup>52</sup> "In appraising the reasonableness of the purchase price as related to the public interest in the transaction now before us, one guide to judgment is the fair commercial price as established by the arm's length bargaining of the parties." *Western-United*, *supra* note 1, at 314.

<sup>53</sup> *Western-United*, *supra* note 1, at 315.

<sup>54</sup> *Id.* at 317.

<sup>55</sup> *Id.* at 318.

<sup>56</sup> *Acquisition of Marquette by TWA, Supplemental Opinion*, 2 CAB 409, 415 (1940). *Cf. Western-United*, *supra* note 1, at 314 (where the Board seems to say that the sole criterion is the judgment of the parties).

<sup>57</sup> 52 Stat. 980, 49 USCA §402 (Supp. 1947).

<sup>58</sup> If the carrier selling the route is a "need" carrier and remains in the industry, there is no reason why the profit made on this transaction would not be a proper charge against its subsidy. See *Western-United*, *supra* note 1, at 328.

<sup>59</sup> There is only one definition of public interest in the statute. 52 Stat. 980, 49 USCA §402 (Supp. 1947).

of air routes should be able to be kept to a minimum, and it is possible that the Board is allowing the sad experience of the railroad industry to warp its judgment in this matter.<sup>60</sup>

It is felt that none of the methods discussed offer a perfect solution to the problem. It behooves the Board to choose a device which will be effective in dealing with the problem and still not be violative of the statute. It is all too easy to forget that essentially the matter before the Board is one of statutory construction and it is submitted that the method chosen by the Board is the only one suggested that lies within a proper interpretation of the present statute.<sup>61</sup>

ALAN F. WOHLSTETTER \*

### JUDICIAL REVIEW OF ORDERS OF CAB WHICH REQUIRE APPROVAL BY THE PRESIDENT

In December 1940, the Waterman Steamship Corporation<sup>1</sup> applied to the Civil Aeronautics Board for a certificate of public convenience and necessity under Section 401<sup>2</sup> of the Civil Aeronautics Act of 1938,<sup>3</sup> in order to operate an air route to Puerto Rico. This application was subsequently consolidated with other applications,<sup>4</sup> and copies of all were submitted to the President as required by Section 801 of the Act.<sup>5</sup> After hearings on these applications, the CAB submitted its opinion and proposed orders to the President. The President disapproved of portions of the proposed orders, and indicated the changes he required.<sup>6</sup> These changes were incorporated in a revised order of the Board which the President approved. Waterman requested a rehearing of this order which had denied its application for a certificate. This request was denied,<sup>7</sup> and Waterman appealed to

<sup>60</sup> See *Union Bus Lines, Inc.—Purchase—Joe Amberson*, 5 MCC 201, 204 (1937).

<sup>61</sup> "Yet it does not necessarily follow that from the standpoint of the over-all public interest it might not be more advantageous to the Nation to bear a greater burden in mail pay in order to achieve benefits in air transportation not obtainable otherwise." See *American Air Lines, Control of Mid-Continent Air Lines*, 7 CAB 365, 383 (1946).

\* Student, Third Year, Harvard Law School. The author expresses his gratitude to Prof. George P. Baker of the Harvard Business School for his indoctrination into the problems of the air transportation industry.

<sup>1</sup> The original applicant was Waterman Airlines, Inc., a subsidiary of the present respondent.

<sup>2</sup> "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board . . ." 52 Stat. 987 (1938), 49 USCA §481 (Supp. 1946).

<sup>3</sup> 52 Stat. 973 (1938), 49 USCA §401 *et seq.* (Supp. 1946).

<sup>4</sup> The consolidated record was known as *Additional Service to Latin America*, 6 CAB 857 (1946).

<sup>5</sup> "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof . . ." 52 Stat. 1014 (1938), 49 USCA §601 (Supp. 1946).

<sup>6</sup> The changes made by the President did not touch upon Waterman's application. 6 CAB 857 (1946). See note 32 *infra*.

<sup>7</sup> CAB Order 4795, May 17, 1946.

the Court of Appeals for the Fifth Circuit under Section 1006(a) of the Act.<sup>8</sup> The Circuit Court held that review was proper,<sup>9</sup> but the Supreme Court granted certiorari,<sup>10</sup> and reversed the decision of the Circuit Court.<sup>11</sup>

The case thus presented the court with the question of whether an American-flag carrier, having been denied an application to operate from this country into a foreign nation<sup>12</sup> could obtain judicial review of this denial. Although the literal language of the statute appears plainly to confer this right,<sup>13</sup> the court held that there could be no review. Looking to Section 1006(a) alone, the majority<sup>14</sup> conceded that a literal reading would indicate review was permissible under the Act.<sup>15</sup> Section 801, however, with the requirement that the President act on negative, as well as affirmative orders of the Board,<sup>16</sup> forced the Court to the conclusion that the President's power was more than a mere ability to thwart affirmative action by the Board.<sup>17</sup> If the President's power was intended to be only a right of veto, why must he act on orders of the Board which do not authorize any positive action by a carrier? Having concluded that the President had a detailed and affirmative power under Section 801, the court felt compelled to hold that where his approval was required, it was his action, not that of the Board, which transformed the administrative process into a final and binding order. The deliberations by the Board in such a case were

<sup>8</sup> "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit court of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. . . ." 52 Stat. 1024 (1938), 49 USCA §646 (Supp. 1946).

<sup>9</sup> *Waterman Steamship Corp. v. CAB*, 159 F. (2d) 828 (C.C.A. 5th, 1947). See Note (1947) 14 J. Air L. & C. 524. *Contra: Pan-American Airways v. CAB*, 121 F. (2d) 810 (C.C.A. 2d, 1941). See Note (1941) 12 Air L. Rev. 406; Note (1947) Col. L. Rev. 1080.

<sup>10</sup> 331 U.S. 802 (1947).

<sup>11</sup> 333 U.S. 103 (1948).

<sup>12</sup> By section 1, subsection 2, an air carrier ". . . means any citizen of the United States who undertakes . . . to engage in air transportation." By the same section, subsection 21, ". . . foreign air transportation . . . means the carriage by aircraft of persons or property . . . between . . . (c) a place in the United States and any place outside thereof . . ." 52 Stat. 977 (1938), 49 USCA §401 (Supp. 1946).

<sup>13</sup> Section 1006(a). See note 8 *supra*. Notice that the only exception to the right of review comes in the case of a foreign air carrier. Section 1, subsection 19 defines a foreign air carrier as ". . . any person, not a citizen of the United States, who undertakes, . . . to engage in foreign air transportation." 52 Stat. 977 (1938), 49 USCA §401 (Supp. 1946). There is no question of congressional purpose. The language of section 1006(a) was specifically amended to read "foreign air carrier," where it had previously read "foreign air transportation." 83 Cong. Rec. 6764 (1938).

It is also interesting to note that shortly after the *Waterman* decision by the Supreme Court, an amendment to section 1006(a) was offered by Senator McCarran, the effect of which was to make it explicit that orders approved by the President should be subject to judicial review, except orders relating to foreign air carriers. 94 Cong. Rec. 7166 (1948). The Bill was sent to the Committee on Interstate and Foreign Commerce.

<sup>14</sup> The court split 5 to 4, Mr. Justice Jackson writing for the majority, while Justices Black, Reed, and Rutledge concurred in the dissent of Mr. Justice Douglas.

<sup>15</sup> 333 U.S. 103, 110 (1948).

<sup>16</sup> See note 5 *supra*.

<sup>17</sup> "Nor is the President's control of the ultimate decision a mere right of veto. It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation or suspension, as well. Thus, Presidential control is not limited to a negative, but is a positive and detailed control over the Board's decisions . . ." 333 U.S. 103, 109 (1948).

deemed to be only advisory,<sup>18</sup> and not creating any binding rights or obligations, could not be subject to judicial review.<sup>19</sup> And after approval by the President which rendered the order effective, constitutional doctrine precluded review of the discretionary executive act which vitalized the Board's decision.<sup>20</sup> Thus to avoid holding Section 1006(a) unconstitutional, the court felt compelled to construe the language of that section as excluding review of orders of the Board which have or require approval by the President.

It may be argued, however, that the Supreme Court should not have considered itself forced to such lengths in order to avoid the constitutional objection. It appears possible to avoid this objection and yet give more complete effect to the language of Section 1006(a) of the Act.<sup>21</sup>

The language of the Act, and its legislative history permit the inference that Congress intended only a limited scope to the President's participation. Throughout the Act there is a differentiation in the treatment of domestic air carriers operating in this country or to the territories, domestic air carriers operating to foreign countries, and foreign air carriers operating within this country.<sup>22</sup> The President's participation is confined by the statute to problems which touch upon considerations of foreign affairs, either by American carriers flying abroad, or alien carriers operating within

<sup>18</sup> The court here, and the court in the *Pan-American Case*, *supra* note 9, relied heavily on an analogy to the case of *United States v. Bush and Co.*, 310 U.S. 371 (1940), in which judicial review of Presidential proclamations of tariff changes was denied. The decision was based on the complete executive nature of the proclamation, made on the basis of recommendations of the Tariff Commission. Although that decision is undoubtedly correct, the comparison of the cases is questionable. Whereas under Section 1336 of the Tariff Act the commission "investigates" and "reports" to the President, who "by proclamation" sets the tariff, under Section 401(d) (1) of the Civil Aeronautics Act, "The Board shall issue a certificate . . . if it finds that the applicant is fit, willing, and able, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied." 52 Stat. 987 (1938), 49 USCA §481 (Supp. 1946). The orders made are orders of the Board, acting independently of the executive office. Section 801, *supra* note 5, gives the President no more than a power to refuse to approve orders of the Board which he considers inimical to the conduct of our foreign affairs. See note 17 *supra*, for the Supreme Court's position on this point.

<sup>19</sup> "But administrative orders are not reviewable unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." 333 U.S. 103, 112 (1948). See *United States v. Los Angeles and Salt Lake R. Co.*, 273 U.S. 299 (1927), and *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1938), to the effect that inconclusive administrative orders, which do not settle the rights and obligations of the parties are not subject to judicial review.

<sup>20</sup> "The dilemma faced by those who demand judicial review of the Board's order is that, before Presidential approval, it is not a final determination even of the Board's ultimate action, and after Presidential approval, the whole order, both in what is approved without change, as well as in amendments which he directs, derives its vitality from the exercise of unreviewable Presidential discretion." 333 U.S. 103, 113 (1948). See also, *United States v. Bush and Co.*, 310 U.S. 371 (1940); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).

<sup>21</sup> See Notes (1947) 14 J. Air L. & C. 524, and (1948) 61 Harv. L. Rev. 1053.

<sup>22</sup> The types of air transportation are carefully defined in Section 1. "(21) 'Interstate air transportation,' 'overseas air transportation,' and 'foreign air transportation,' respectively, mean . . . (a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession (except the Philippine Islands) of the United States, or the District of Columbia; (b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United

this country.<sup>23</sup> Both the statutory language and the legislative history indicate unmistakably that the participation of the President was allowed solely on a consideration of his responsibility for the integrity of our foreign affairs.<sup>24</sup> Since this is so, it is logical to suppose that Congress intended his participation to be confined solely to such considerations.<sup>25</sup> Despite the conclusions of the majority of the court,<sup>26</sup> the language of Section 801 in requiring the approval of the President, or, by implication, his disapproval, does not give the President any more than a power to disapprove of orders of the Board.

Assuming, for the moment, that such a limited role by the President is practicable, the Supreme Court's objections to judicial review of presidentially approved orders would seem to be answered. The President's action would render an affirmative order of the Board effective, but not precluded from judicial review by reason of a lack of binding effect.<sup>27</sup> By confining the President's considerations to those of foreign affairs, the final order becomes in reality a dual entity. It is a statement by the Board that the designated carrier is fit, willing and able to fly the route, which the Board deems to be demanded by the public convenience and necessity. It is a statement by the President that the operation of the route by an American-flag carrier has been coordinated with our foreign policy. Allowing the courts to review a determination by the Board that a particular carrier is, or is not, qualified to fly a route which is demanded by public convenience and necessity is not a review of executive discretion and is not contrary to constitutional principles.<sup>28</sup> The constitutional objection is avoided, and a rather sweeping disregard of express statutory language is unnecessary.

Since the four dissenting justices found an identifiable portion of the final order which was clearly the work of the Board and thus was subject

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States, and a place in any other Territory or possession of the United States; and (c) a place in the United States and any place outside thereof . . ." 52 Stat. 977 (1938), 49 USCA §401 (Supp. 1946). A foreign air carrier is a person not a citizen of the United States who seeks to engage in foreign air transportation. See Section 1, subsection 19, note 13 *supra*. While a domestic air carrier is required to obtain a certificate prior to operation, Section 401, *supra* note 2, by Section 402, "No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board . . ." 52 Stat. 991 (1938), 49 USCA §482 (Supp. 1946).

<sup>23</sup> See Section 801, note 5 *supra*.

<sup>24</sup> See *Hearings Before Committee on Interstate and Foreign Commerce, H.R. 9738, 75th Cong., 3rd Sess. (1938)*. See note 25 *infra*.

<sup>25</sup> It would seem very strange that Congress would establish an administrative board of experts to make determinations on highly technical matters, and then give the President, acting without advice as far as these determinations are concerned an uncontrolled power to require contrary orders from the Board. See *Hearings Before Committee on Interstate and Foreign Commerce on Bills Relative to Overseas Air Transportation, 80th Cong., 1st Sess. (1947)*. At page 1260, Mr. Landis, then Chairman of CAB, said, "My feeling is that certainly you want an overriding power of the President to supervise the actions of the CAB in this field, because there may be very broad considerations of policy that commend a type of action of which he alone can be aware and can appreciate the significance. But the alteration of decisions, other than a chipping off of certain portions of them by a partial veto, I do not think is contemplated by Section 801." Mr. Wolverton, Chairman of the Committee, expressed his view in this manner: "I have no hesitancy in saying that it was my understanding of the Act when it was originally drawn that such power was given to the President as having an over-all knowledge of the foreign situation and that foreign affairs alone would dictate the approval or disapproval."

<sup>26</sup> See note 17 *supra*.

<sup>27</sup> See note 19 *supra*.

<sup>28</sup> See note 20 *supra*.

to judicial review,<sup>29</sup> and since the majority of the court admitted that they were not reading the language of the statute literally,<sup>30</sup> the question remains as to why the possibility was rejected by the majority of the court. Any inquiry is largely a matter of speculation in view of the fact that the majority rather summarily concluded that the final order was an act of executive discretion, without attempting to evaluate the argument of a two part order.

In the first place, it has to be admitted that in its operation under the Act, the CAB has denied the limited scope of the President's participation and has considered itself bound by his recommendations, whether matters of foreign affairs, or questions of qualifications under the terms of the statute.<sup>31</sup> While such interpretation by the administrative agency has some validity,<sup>32</sup> it is certainly not binding upon the courts,<sup>33</sup> at least in the absence of a long continued and settled practice.<sup>34</sup> Certainly there is no settled practice involved here which alone would have influenced the court to the position it assumed.<sup>35</sup>

It is also argued that since the President is required only to approve or disapprove, without assigning reasons for his actions, it is impossible to specify the grounds on which he shall base his actions, and more particularly, to confine him to action within whatever grounds may be specified. In a very practical sense the argument has validity, in that even if it can be shown that the President has acted on considerations which the statute

<sup>29</sup> "Congress made reviewable by the courts only orders 'issued by the Board under this Act.' Those orders can be reviewed without reference to any conduct of the President, for that part of the order which is the work of the Board is plainly identifiable. The President is presumably concerned only with the impact of the order on foreign relations or military matters. To the extent that he disapproves action taken by the Board, his action controls. But where that is not done, the Board's orders have an existence independent of Presidential approval, tracing to Congress' power to regulate commerce." Douglas, J., dissenting in the principal case, 333 U.S. 103, 116 (1948).

<sup>30</sup> 333 U.S. 103, 110 (1948). The court admits the literal meaning of the language of Section 1006(a) confers the right to judicial review. The court also conceded that the language was deliberately employed.

<sup>31</sup> See *Additional Service to Latin America*, 6 CAB 857 (1946), *supra* note 6. The President disapproved the issuance of a certificate to Pan-American Airways and directed that a certificate for the same route be issued to Western Airlines, Inc. The language of the Board's opinion, in which the directions of the President were incorporated, indicates that the Board considered itself bound by the President's action. For another recent manifestation of the same attitude on the part of the Board, see *Pacific Northwest-Hawaii Service Case*, CAB Order E-1832, March 16, 1948. Considering applications by Northwest Airlines, Matson Navigation Co., Pan-American Airways and Transocean Air Lines, the Board decided that one carrier, on a temporary basis, was required by the public convenience and necessity. The Board selected Northwest Airlines as that carrier. The President approved and the certificate was issued. On October 4, 1948 the Board issued a supplemental opinion in the case, and recited that pursuant to a directive of the President, based on "the national security and the public welfare," that Pan-American would be certificated to fly the same route. CAB Press Release No. 48-81, October 4, 1948.

<sup>32</sup> *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935). See *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 290 (1946), where the idea is expressed that as these interpretations are often made in the absence of adversary proceedings, they should be entitled to less weight.

<sup>33</sup> See *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), where the court overruled an interpretation by the Administrator of the Fair Labor Standards Act of 1938.

<sup>34</sup> *Iselin v. United States*, 270 U.S. 245 (1926). For the effect of a long continued administrative practice, see *Helvering v. Winmill*, 305 U.S. 79 (1938).

<sup>35</sup> The Civil Aeronautics Act took effect in 1938. The issue herein involved had been before the courts only twice (note 9 *supra*) before presentation to the Supreme Court as a matter of first impression.

has attempted to put beyond his reach, there are no sufficient means by which he can be disciplined and forced to remain within the designated bounds. This situation is fairly common in our system of rough checks and balances, however.<sup>36</sup> Frequently the limits to interaction between the branches is obscure. The proper operation of the system depends upon a restraint by each branch of itself, as well as restraint by one branch on another.<sup>37</sup> Each must give the other branches an opportunity to perform their functions properly and if Congress here chooses to take the risk of participation by an executive who will perhaps overstep certain designated limits, the choice is properly made by Congress and not for Congress by the judiciary.

Undoubtedly the most substantial objection to the suggested division of the final order stems from the same uncertainty as to the basis on which the President might approve the Board's denial of an application. Since his approval may result from a determination that an American air route in that particular locale would prejudice the conduct of our foreign affairs, as well as a mere consent to the Board's determinations, it is said that judicial review of the Board's order in this case is unconstitutional because it concerns an issue which is subject to subsequent executive action which may prevent its effectiveness.<sup>38</sup>

The argument, however, seems to read too much into the requirement of judicial finality. That rule is satisfied if there is a real issue between the parties which the court is in a position to settle conclusively, whether or not completely distinct factors may enter the picture and prevent the settlement from effectively imposing obligations or creating rights.<sup>39</sup> The problem here is whether such an issue is involved when a party to CAB proceedings appeals the Board's decision as to questions of fitness, willingness, or ability, or its determination as to the public convenience and necessity, when the final determinations which result from such appeal may be rendered ineffective by the refusal of the President to approve. Decisions of the Court of Claims provide a pertinent line of inquiry. Though these decisions depend upon subsequent appropriations by Congress to make them effective as a practical matter, they are subject to review despite the inability of the court to force appropriation by Congress of the necessary funds.<sup>40</sup> Similarly, courts continually review adjudications of criminal guilt, though it is within executive power to render these determinations ineffective by means of a pardon. Here there is a real issue presented to

<sup>36</sup> Congress cannot be forced to appropriate funds to satisfy Court of Claims judgments. See *Gordon v. United States*, 117 U.S. 697 (1895), and *United States v. Lovett*, 328 U.S. 303 (1946). Presumably the Supreme Court could decide an issue on other than legal considerations and yet not be subject to effective discipline. See note 41 *infra*, for an example of the failure of Congress to make a necessary appropriation.

<sup>37</sup> See Mr. Justice Burton dissenting in *Duncan v. Kahanamoku*, 327 U.S. 304, 338 (1946).

<sup>38</sup> *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386 (1934); *Muskrat v. United States*, 219 U.S. 346 (1911); *Gordon v. United States*, 117 U.S. 697 (1894).

<sup>39</sup> *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270 (1941); *Federal Power Commission v. Pacific Power and Light Co.*, 307 U.S. 156 (1939); *Nashville, C. and St. L. Railway Co. v. Wallace*, 288 U.S. 249 (1933).

<sup>40</sup> *United States v. Jones*, 119 U.S. 477 (1886); *United States v. Lovett*, 328 U.S. 303 (1946). Compare this with the decision of *Gordon v. United States*, 117 U.S. 697 (1895), where Court of Claims judgments were held non-reviewable under the Court of Claims Act which required the approval of the Secretary of the Treasury of such judgments. Where the validity of the judgment itself is subject to later executive action, there can be no judicial review. See *Gordon v. United States*, *supra*. Where subsequent executive action will perhaps only prevent actual enforcement of the order, however, there is an issue which is subject to re-

the court upon review. The parties are in conflict as to whether the denial of an application was proper under the statute. The court is in a position to settle that question conclusively, whether or not the President, acting upon entirely distinct considerations of foreign policy, prevents the ordinary consequences to follow from a Board order which has been amended after judicial review.

Although the suggested interpretation of the Civil Aeronautics Act does not afford a completely efficient administrative process,<sup>41</sup> and perhaps does not give full effect to all the language of the statute,<sup>42</sup> it is suggested that the difficulty arises from the nature of the problem which the statute is designed to cover, and from the mechanical difficulties of language in attempting to delineate between the concern of Congress for the regulation of Commerce, and that of the Chief Executive for the conduct of our foreign affairs.<sup>43</sup> The interpretation suggested here, however, seems to provide a workable statute, and yet to give effect to the objectives of the statute with a minimum of violence to the language of Section 1006(a).

J. F. G.

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#### PARAMOUNT PUBLIC INTEREST IN INTERNATIONAL NEW ROUTE CASES

An air carrier<sup>1</sup> seeking to engage in foreign air transportation must first obtain a certificate of public convenience and necessity from the Civil Aeronautics Board issued under section 401 of the Civil Aeronautics Act of 1938.<sup>2</sup> The Board, in making a determination as to whether such certificates should issue, must consider the Congressional "Declaration of Policy," found in section 2 of the Act, wherein the Board is admonished to encourage and develop an air transportation system adopted to the present and future needs of the foreign as well as the domestic commerce of the United States,

view. See *United States v. Lovett, supra*, and *Federal Power Commission v. Pacific Power and Light Co.*, 307 U.S. 156 (1939).

There appears to be no objection to judicial review of orders of the CAB where Presidential approval is not required. Yet these orders may be rendered ineffective by failure of Congress to appropriate the necessary funds. Congress so failed to appropriate the necessary funds in the *American Export Airlines Case*, 2 CAB 16 (1940).

<sup>41</sup> The requirement of judicial review of a denial of an application by the Board, which has been approved by the President may be wasted effort, inasmuch as the President may subsequently disapprove of an affirmative order of the Board issued in compliance with the order of the reviewing court.

<sup>42</sup> There is some inconsistency between the conclusion that the President has a mere power of veto under Section 801, note 5 *supra*, and the language of that section in requiring his approval or disapproval of negative orders of the Board. The inconsistency is partially answered by considering this requirement as an invitation to the President for his recommendations, which, if containing secret information, are protected from public disclosure by Section 1104 of the Act. 52 Stat. 1026 (1938), 49 USCA §674 (Supp. 1946). Acceptance of this answer seems to conform more closely to the language of Section 801, note 5 *supra*, than does the conclusion of the Supreme Court conform to the language of Section 1006(a), note 8 *supra*.

<sup>43</sup> See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), for a good example of the interplay of these two interests.

<sup>1</sup> An "air carrier" is any citizen of the United States who undertakes to engage in air transportation. 1(2), 52 Stat. 987 (1938), 49 USCA §481 (Supp. 1946).

<sup>2</sup> Foreign Air Carriers file under section 402(b) of the Act, which has no "public convenience and necessity" clause, and the Board need only find that the transportation covered by the application is "required by the public interest."



of the Postal Service, and of national defense, and to authorize "Competition to the extent necessary" to assure the development of such a system.<sup>3</sup> Before publication, certificates authorizing U.S. flag carriers to engage in overseas and foreign air transportation must be submitted to the President for approval.<sup>4</sup>

In the first international air route cases the Board set up three general criteria for determining whether the public convenience and necessity required the certification of the proposed service in the particular situation presented. These criteria are:<sup>5</sup>

- (1) Whether the new service will serve a useful public purpose, responsive to a public need;
- (2) Whether this purpose can and will be served adequately by existing facilities;
- (3) Whether the cost to the Government will be outweighed by the benefit which will accrue to the public from the new service.

During this period, before World War II, the Pan American Airways system and its half-owned, Panagra, enjoyed a virtual monopoly of all United States international air service.<sup>6</sup>

The first competition on a major route for Pan American Airways system from an American-flag carrier was authorized by the Board in July of 1940, when American Export Airlines<sup>7</sup> was temporarily certified across the North Atlantic to Lisbon.<sup>8</sup> In this case the Board did not enumerate its three point standard as such. Although public interest was found to require additional service, the Board recognized that competition was the underlying issue of the case.<sup>9</sup> The Board concluded that under Section 2 of the Act competition is not mandatory, but that it is within the discretion of

<sup>3</sup> 52 Stat. 980 (1938), 49 USCA §402 (Supp. 1946).

<sup>4</sup> Section 801 of the Act, 52 Stat. 1014 (1938), 49 USCA §601 (Supp. 1947). Approval of the President is not needed in domestic cases. In international cases, the Board is initial arbiter and the President's advisor. *CAB v. Waterman Steamship Corp.*, 333 U.S. 103 (1948). In domestic cases the Board is the sole arbiter. *United A. L. v. CAB*, 155 F.(2d) 810 (C.A.A. 2d, 1944).

<sup>5</sup> These factors were considered in *Pan American Inc., Los Angeles-Mexico City Operation*, 2 CAB 807, 809 (1941). A Fourth test was added in those cases involving service to Canada: (4) whether the applicant can serve the purpose without impairing the operations of existing carriers contrary to the public interest. *Western Air Express, Great Falls-Lethbridge Operation*, 2 CAB 425 (1940). These four tests were also used in the earlier domestic route cases. *United A. L., Red Bluff Operation*, 1 CAA 778 (1940); *Trans-Southern Air, Amarillo-Oklahoma City Operation*, 2 CAB 250 (1940), and previous cases cited therein; see also, Comment, 14 J. Air L. & C. 177 (1947). The new route cases are to be distinguished from the "grandfather" cases under Section 401(e) of the Act.

<sup>6</sup> LISSITZYN, INTERNATIONAL AIR TRANSPORTATION 240 (1942).

<sup>7</sup> Now: American Overseas Airlines.

<sup>8</sup> *American Export Air, Trans-Atlantic Service*, 2 CAB 16 (1940).

<sup>9</sup> The Board rejected Pan American's contentions that foreign-flag carriers would supply the necessary competition. Also rejected was American Export's contention that competition was mandatory under Section 2 of the Act. The Board said quoting from its opinion in *Acquisition of Western A. E. by United A. L.*, 1 CAA 739 (1940): "Reference to both the legislative history and to the text of the Act demonstrates the Congressional intent to safeguard an industry of vital importance to the commercial and defense interests of the nation against the ends of unrestrained competition on the one hand, and the consequences of monopolistic control on the other." This conclusion receives support in the remarks of Senator McCarran made in the course of the debate on the floor of the Senate prior to the enactment of the Act. Vol. 83, Congressional Record, 75th Congress, 3rd Session pp. 9029-30, May 13, 1938. *American Export Inc.*, 2 CAB 16, 31 (1940).

the Board to determine whether or not competition in a particular area is necessary to assure the attainment of the objectives of the Act. Competition was held to be justified at even greater cost to the government.<sup>10</sup>

Between December 1941 and June 1943, there was a suspension of most international applications by the Board in the interest of the war effort.<sup>11</sup> Public interest required the issuance only of temporary certificates, with the needs of the war effort and considerations of national defense of prime importance.<sup>12</sup>

Since the end of the war, there has been a comprehensive expansion in the authorization of new routes for American-flag carriers in the international field. After extensive study, the Board announced on June 14, 1944, "the international air routes which it had tentatively concluded would be desirable for post war operation by United States air carriers."<sup>13</sup> This determination of routes before a certification proceeding was a considerable departure from the Board's usual procedure in both the international and domestic fields.<sup>14</sup> Following the release of the public announcement of the route pattern, the United States carriers were invited to submit applications for the various routes and consolidated proceedings were scheduled in conformity with this program.<sup>15</sup>

The first of these intercontinental proceedings to be decided by the Board was the *North Atlantic Case*.<sup>16</sup> Because of the heavy traffic between the United States and Europe, this case was of unusual significance. At the outset, the Board held that there was no issue as to whether as a matter of policy<sup>17</sup> United States international air service should be rendered by a chosen instrument.<sup>18</sup> The Board not only reaffirmed its position that competition was desirable<sup>19</sup> in the international field, but concluded that domestic carriers should be authorized to engage in international operations.<sup>20</sup>

<sup>10</sup> Congress refused the appropriation necessary to permit operation of this route. LISSITZYN, op. cit. *supra* note 7 at 257.

<sup>11</sup> CAB Ann. Rep. 20-21 (1942).

<sup>12</sup> New Route Cases; *Pan. Am. Airways Co., United States-Africa Service*, 3 CAB 47 (1941). Terminal points were Miami, Florida, and Leopoldville, Belgian Congo. Certificates in this case were limited to a five year period or to terminate at the discretion of the Secretary of State. *American Export*, 3 CAB 294 (1941). Terminal points New York, N. Y. and Foynes, Irish Free State. In *American Air., Temporary Mexico City Operation*, 3 CAB 415 (1942), the Board found that a route from El Paso, Texas and Mexico City, Mexico was not in the public interest but the certificate was awarded in accordance with the recommendation of the President.

<sup>13</sup> For a listing of the routes, see CAB Annual Report for 1944, 11-14.

<sup>14</sup> The Board has been frequently criticized for authorizing new domestic routes without ever having formulated a basic pattern of airline service for the United States. See Patterson, *Stewardship of the Airlines by the Civil Aeronautics Board*, *supra*.

<sup>15</sup> These cases are *Northwest Air. et al., North Atlantic Routes*, 6 CAB 319 (1945); *Additional Service to Latin America*, 6 CAB 857 (1945); *Northwest Airlines Inc., et al., Pacific Case*, 7 CAB 209 (1946); *American Overseas Airlines, Inc., et al., South Atlantic Case*, 7 CAB 285 (1946).

<sup>16</sup> These considerations were adhered to in all of the post-war cases.

<sup>17</sup> The Board said this issue was settled by Congress in the Civil Aeronautics Act of 1938 and that any arguments or contentions directed to the validity of such policy are properly addressed to the Congress and not to the Board. *North Atlantic Case*, *supra* note 15 at 323.

<sup>18</sup> For a discussion of the "chosen instrument" controversy see, *Hearings Before the Committee on Interstate and Foreign Commerce H. R. 939*, 80th Cong., 1st Sess. and 79th Congress, 1st Session on S. 326, pp. 10-11.

<sup>19</sup> Competition in the international field was first stated to be in the public interest in *American Export*, *supra* note 8.

<sup>20</sup> In 1931 Postmaster General Brown advised the domestic air carriers to stay out of the international field and the international carriers to stay out of the domestic field. LISSITZYN op. cit., *supra* note 7.

To facilitate flexibility in the adjustment of certificates to meet changing political and economic conditions during the post-war period, the Board determined that all certificates issued were to be limited to a period of seven years from their effective date.<sup>21</sup> It was also decided that certificates would be issued for routes into areas for which no landing rights had been obtained.<sup>22</sup>

The North Atlantic area was recognized as the most important world area from a political, commercial, and competitive standpoint. To assure the sound development of the United States air transportation within Europe and the near East, this territory was divided into Northern, Central, and Southern areas.<sup>23</sup> It was believed that this plan offered the greatest opportunity for a sound growth and development of the traffic potentialities and still the necessary degree of competition.<sup>24</sup> It was optimistically predicted that the advantages of air transportation would effect a substantial increase in U.S. traffic to the heavily populated and industrial interior areas as market sources. Whereas the records show that 47% of United States travel to Europe in the three years immediately preceding the war was recreational, it was anticipated that there would be a marked increase in non-recreational travel which would tend to equalize the seasonal variations and directional unbalance which has characterized historical transatlantic surface travel.<sup>25</sup>

Estimates of probable express, freight, and other cargo volume were given due consideration, although the Board recognized that passenger traffic in general would constitute the principal source of commercial revenue for the transatlantic air carriers during the first post-war decade. The record did not show that the volume and nature of market potentials generated by the great majority of foreign traffic centers warranted direct service on more than one United States flag route. The exceptions were the London and Lisbon gateways. The more important of the European centers are included within a relatively small geographical area connected by extensive surface and air transport facilities. Further, transatlantic carriers of foreign nationality were expected to share the traffic between these centers and the United States. It was concluded that the public interest would be best served by a single United States carrier being certified within each of the three areas.

Mr. Branch dissented on the authorization of TWA's route segment from Cairo to Bombay. As the majority opinion did not discuss the com-

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<sup>21</sup> The Board pointed out that it was impossible to predict the volume of traffic to and from Europe, the precise operating rights through the countries of Europe, including the duration and extent of such rights, as well as the whole course of international relations which might affect the future of international air transportation. This is equally true of the later cases.

<sup>22</sup> It was believed that it was not only desirable, but perhaps necessary, that the Department of State have a proposed air service pattern to assist in diplomatic negotiations for the necessary commercial landing rights.

<sup>23</sup> The northern area included the Scandinavian countries, the United Kingdom, the northern section of Germany, Poland, and eastern Russia. The central area was composed of central Europe and extended into Asia to India. The southern area included Western Europe, the Mediterranean, North Africa and southern India.

<sup>24</sup> The three area plan would limit direct duplicating United States services to two major Atlantic gateways, London and Lisbon, leaving the carriers free to fully develop the traffic potentials within their respective areas.

<sup>25</sup> The Passport Division of the Department of State estimated that from 1935 to 1938, 47% of total overseas travel by United States citizens was for purposes of recreation, 35% for family affairs and personal business, while commercial and professional business together accounted for only 6.2% of such travel. *North Atlantic Case*, *supra* note 15 at 330.

mercial necessity of this southern route, or PAA's more northerly route through Turkey to Karachi and Calcutta, it seems probable, in view of the low traffic potential of this segment, that it was certified on a basis of consideration of foreign policy rather than commerce.

Somewhat different problems were presented in the *Latin American Case*.<sup>26</sup> After pointing up the community of interest and the statistical data relative to the traffic potential in the area involved, the Board compared the advantages of various United States cities around the Gulf and in the Southeastern states as gateways to Latin American traffic. In considering service by American carriers below the north coast of South America,<sup>27</sup> the majority recognized the need for competition but reached the conclusion that the traffic potential was not such as would justify the maintenance of duplicate schedules.<sup>28</sup> The majority stressed the part economic considerations should play and concluded that an additional route was not justified. Chairman Pogue, in his dissent, held that rigid application of economic standards could be made only at the expense of other important considerations of national welfare<sup>29</sup> and urged that an additional route be certified. Mr. Lee recommended certification of two new routes within South America, expressing the belief that the Board should at once provide a competitive system of trunk lines to all important areas in South America, evaluating the traffic potentials from a long range point of view. The President's solution included a second carrier.<sup>30</sup>

The route pattern of the *Pacific Case*<sup>31</sup> was conditioned by the long distances between traffic terminals. Two natural routes existed, the northern Great Circle route and the long central over water route through Hawaii, Midway, and Guam. The majority decided one carrier should be certified over each of these routes to the Orient, and that the routes of Pan American and TWA into India should be extended eastward to connect with them<sup>32</sup> giving the United States two round-the-world services. Mr. Branch's dissent expressed the fear that an extension of TWA's routes, in view of meager traffic potentials, would put too heavy a drain upon that carrier's financial resources; and that it might even weaken TWA's credit standing, thus affecting its development in both the international and domestic fields.<sup>33</sup> Mr. Lee argued that the risk of extravagant and unjustified international air services is not so great as the danger of a failure to meet the public demand for adequate air transportation, thereby leaving a gap in the

<sup>26</sup> *Additional Service to Latin America*, *supra* note 15.

<sup>27</sup> For convenience the Board divided this case into three areas for consideration: (1) Mexico, Cuba, and the Bahamas; (2) Caribbean region, Central America, and the north coast of South America; (3) the remainder of South America. *Id.* 6 CAB at 869.

<sup>28</sup> It was believed that extension of Panagra's routes into the United States would provide sufficient competition over divergent routes. *Id.* 6 CAB at 914.

<sup>29</sup> Some of these intangible factors specifically mentioned were the need for fast, efficient and cheap transportation, and the need, as indicated by the war, for a system linking all points required by the national interest. Revised opinion of the Board, March 4, 1946, made public by letter to the Subcommittee of the Senate Committee on Appropriations, May 6, 1948.

<sup>30</sup> The President recommended that an additional route be certified in this area. It is probable that this recommendation was motivated by considerations of national defense.

<sup>31</sup> *Pacific Case*, *supra* note 15.

<sup>32</sup> These routes had been certified in the *North Atlantic Case*, *supra* note 15. TWA's routes were extended to connect with the Pacific route certified to Northwest Airlines, while P.A.A. was given the final links for a single round the world system. *Pacific Case*, *supra* note 15. As of November, 1948, TWA was not operating the routes certified to it in the *Pacific Case*.

<sup>33</sup> See Mr. Branch's dissenting opinion in the *North Atlantic Case*, *supra* note 15, wherein he opposed the extension of TWA's routes from Cairo to Bombay.

foundation of the air pattern of American-flag carriers which would be filled by foreign competitors. In addition, a failure to authorize another carrier to operate a second northern route into the Orient and an additional route from Hawaii to Japan would put Pan American in such an overpowering position in the Orient that it would be difficult for any other American carrier to offer really effective competition; thereby nullifying the whole effort of the Board to create a wholesome competitive balance in the Pacific area.

In the *South Atlantic Case*<sup>34</sup> it was recognized that the cost of the service would be relatively high in comparison to the commercial value of the proposed routes.<sup>35</sup> It was found that the traffic potential would not permit competition in this area. The proceeding involved two more or less independent services. Commercial and traffic potentials were found sufficient to justify a direct United States to Africa service. The second route from South America across the South Atlantic to Africa was authorized solely on considerations of national defense.

The Board has not in these post-war cases, followed its earlier three point test of public interest as such, but has rather emphasized two considerations as paramount:

- (1) The Commercial;
- (2) The Competitive;

without enumerating them as such.

In considering the commercial criterion, the Board has had to weigh the need for a given service with its cost to the government. In all of the cases the Board considered the historical statistics and information on traffic to and from the United States and the area under consideration.<sup>36</sup> The historical record, while affording valuable background for estimating future requirements, was recognized as having its serious limitations. It was optimistically predicted that post-war air transportation would see marked increases in the traffic between all world areas. The determination of international air routes was not measured solely in economic terms of passengers carried and revenue ton-miles flown, but also in terms of broad national welfare and many intangible factors that affect it. Although national defense was only explicitly recognized as a predominant factor in the *South Atlantic Case*, it seems most probable that it was given great weight in the certification of TWA's route across Northern Africa in the *North Atlantic Case*.

The Board has adhered to the position that a sound development of our international air service requires competition.<sup>37</sup> The policy of regulated

<sup>34</sup> *South Atlantic Case*, *supra* note 15.

<sup>35</sup> The Board said that in view of our pre-war commerce with Africa; and the probability that the United States would be able to take over a substantial portion of the former Axis nations trade in the area the northern route would be in the public interest. The prospects of any traffic over the southern route from South America to Africa were believed to be too meager to warrant authorization of the route from an economic standpoint.

<sup>36</sup> The records contained statistics on passport issuances, the flow of mail and parcel post to and from areas, hotel reservations, and freight and passenger traffic data of surface carriers and other like information.

<sup>37</sup> Pan American had opposed the applications of all other carriers upon the grounds that: (1) the airline which had pioneered a route or territory should be permitted to continue to develop that route or territory to the point of full utilization of its facilities; (2) the public is interested in the economies which are possible through the use of large high-speed aircraft which could not be efficiently operated if the traffic must be shared with two or more American-flag operators; (3) increasing foreign-flag competition would supply all the competition required

competition as contemplated by the Act<sup>38</sup> has been held in all the post-war cases, except the *South Atlantic Case*, to require competitive service over comparable or alternative routes within the major geographical areas, but not necessarily duplicating services.<sup>39</sup> It is believed that the greatest benefit from competition, whether it be actual or potential, is the stimulus to devise and experiment with new operating techniques and new equipment, to develop new means of acquiring and promoting business, including the rendering of better service to the public and to the country, and to "afford the Government comparative yardsticks" by which the performance of the United States operators can be measured. The diversion of passengers and revenue which a competing service will cause between the various carriers as a factor in the international cases has not been accorded the same importance as it has in the domestic cases.<sup>40</sup>

When competition has been decided upon, the selection of carriers becomes a major problem. The Board has stressed as essential that the selected carrier be strong in organization, experience, financial position, and executive ability if the public interest is to be best served. In the *North Atlantic Case* the Board was faced with a choice of Pan American and American Export, five domestic carriers and three corporations which had not as yet engaged in air transportation. Pan American was selected because of its long history and noteworthy achievements in the international field. The Board reviewed the wartime experience of American Export, and also its proposed merger with American, the largest of the domestic transcontinental carriers. The Board approved the acquisition of American Export by American and certified the northern route to it, stating that this would permit the utilization of the combined strength of the two companies, making use of the operating organization and experience and traffic generating facilities of American in this country and the experience gained by Export in its international service.

TWA was selected from the remaining applicants on the basis of its superior financial strength, organization and experience. In rejecting the

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by the public interest; and (4) regulated monopoly would better serve the public interest. These contentions were advanced and rejected in the *North Atlantic Case*, *supra* note 15, and in *Additional Service to Latin America*, *supra* note 15 at 861.

<sup>38</sup> The Board has taken the position that Congress has left to the discretion of the Board the determination of whether or not competition in a particular area is necessary to assure the sound development of an appropriate air transportation system.

It was pointed out in the *American Export Case* that the economic regulatory power conferred by Title IV of the Act is less comprehensive in respect to air carriers engaged in foreign transportation than to those engaged in domestic service. Whereas the Board may enforce the duty imposed on the air carriers by sec. 404 (a) to provide adequate service, equipment, and facilities in interstate or overseas air transportation, its power in this respect does not extend to operations of air carriers engaged in foreign air transportation, upon whom the Act imposes no similar duty. Moreover, the Board's power to regulate rates, fares, and charges of air carriers does not extend to operations in foreign air transportation. Thus regulation alone may not be relied on to take the place of the stimulus which competition provides to the advancement of techniques and service in air transportation. Competition invites comparisons as to equipment, costs, personnel, methods of operations, solicitation of traffic, and the like, all of which tend to assure the development of an air transportation system properly adopted to the present and future needs of foreign and domestic commerce of the United States, of the Postal Service, and of national defense. *American Export Case*, *supra* note 8.

<sup>39</sup> Point to point competition was presumed to be furnished by foreign-flag carriers.

<sup>40</sup> This factor was given the most weight in *Additional Service to Latin America*, *supra* note 16. For its importance in domestic new route cases see Comment 14 J. Air L. & C. 177 (1947).

two newly formed companies the Board pointed out that their lack of facilities would not permit the earliest operation of the routes. The one steamship company was rejected on a basis of lack of experience. In the *Hawaiian Case*, however, Matson was rejected because it was too strongly entrenched in the tourist business and would not have an undivided loyalty to the development of the air transportation.<sup>41</sup> Among the other factors considered, the Board attempted to select the carrier which can best integrate the new international route with its existing routes, both international and domestic, and which can make the fullest utilization of existing facilities.<sup>42</sup>

It must be borne in mind that all the certificates granted in the post-war intercontinental cases are for a seven year period. As these certificates expire, the Board will be able to resurvey its entire route pattern, and with the experience and data gained in these years substituted for the estimates which formed a basis for these decisions, a sounder, more integrated pattern of international air service should evolve.

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<sup>41</sup> *Hawaiian Case*, 7 CAB 83 (1946). This was an overseas air transportation case involving only United States territory, but the problems presented were in many respects similar. In rejecting the applications of two steamship companies in the *South Atlantic Case* the Board recognized that they presented fairly adequate organizational plans, but that their fulfillment would necessarily require greater time and be susceptible to longer periods of adjustment than would be those of an existing carrier.

<sup>42</sup> This factor was of particular importance in the *Pacific Case*, *supra* note 15, at 22.

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